

FCC MAIL ROOM

JUN 24 1997
BEFORE FEDERAL COMMUNICATIONS COMMISSION

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In Re THE NORTH AMERICAN NUMBERING COUNCIL
RECOMMENDATION REGARDING THE NUMBERING
PLAN ADMINISTRATOR (NANPA) AND BILLING
AGENT AND RELATED RULES:

CC Docket 92-237

**AMENDED COMMENTS BY COMMUNICATIONS VENTURE SERVICES, INC.
AND RICHARD C. BARTEL**

The North American Numbering Council (NANC) has stated in its NANPA recommendation that it did not reach consensus (also the vote was 13 to 11). Therefore, for the reasons below¹, the NANC action cannot be recognized as consensus as a matter of law.²

Therefore, the F.C.C. should now review the NANPA submission(s) of the proponents *de novo* in a public manner or proceeding. In addition, it appears that the NANC is participating in negotiated rulemaking process.³

We would suggest that the proposed regulations codify the policy previously pronounced by the Commission which has declared in administrative *dicta* that numbering resources⁴ are a public resource and not a private property right. The Commission should also codify a version of NANC's Dispute Resolution processes to include appointment of Special Government Employee(s) during its final stages to attach administrative adjudicatory effect (at least fact finding).

¹ By Notice DA 97-1055 posted on the FCC Internet Web Site, we hereby make comment on the above proceeding on the stated deadline of June 20, 1997.

² The NANC's activities appear to involve the compilation of substantial evidence for the Commission's review of strategies for effectively regulating the numbering plan and its administration, through NANC's direct work and its working group(s); thus the NANC's work has a role in the formulation of the already intended FCC regulations which will address management of the numbering plan for which the FCC has exclusive jurisdiction (i.e.: Sec. 251(e)(1) of the 1996 Act). Thus the NANC is likely participating in a negotiated rulemaking process.

³ See: Associated Industries of New York State, Inc., Petitioner v. U. S. Dept. of Labor, Respondents, 487 F.2d 342 (2nd Cir. 1973); Collective Ratemaking and Consensual Decision-making, August 20, 1982: The Political Legitimacy and Judicial Review of Consensual Rules, Philip J. Harter, 32 Am. U.L. Rev. 471 (Winter, 1983); San Diego Gas and Electric Company, Petitioner, v. Superior Court of Orange County, Respondent; Martin Covalt, et al., Real Parties in Interest, 13 Cal. 4th 893, 920 P.2d 669 (Ca. 1996).

⁴ Those numbering resources which the public uses or those which are "susceptible to unfair and deceptive practices" (i.e. Federal Trade Commission activity under FTC File R-611016, as an example) or which facilitate anti-competitive behavior by carriers or others regulated by the F.C.C. or the States.

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STATUTORY AND REGULATORY BASIS

The F.C.C. regulation regarding the NANC states in part:

"47 C.F.R. 52.11 North American Numbering Council:

The duties of the North American Numbering Council (NANC), may include, but are not limited to:

- (a) Advising the Commission on policy matters relating to the administration of the NANP in the United States;
- (b) Making recommendations, **reached through consensus**, that foster efficient and impartial number administration;
- (c) Initially resolving disputes, **through consensus**, pertaining to number administration in the United States;
- (d) Recommending to the Commission an appropriate entity to serve as the NANPA;
- (e) Recommending to the Commission an appropriate mechanism for recovering the costs of NANP administration in the United States, consistent with 52.17;
- (f) Carrying out the duties described in 52.25; and
- (g) Carrying out this part as directed by the Commission."

Title 5 of the United States Code defines consensus as:

"5 U.S.C. 562. (1997) Definitions: For the purposes of this subchapter, the term--

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "consensus" means unanimous concurrence among the interests represented on a negotiated rulemaking committee established under this subchapter , unless such committee--
 - (A) agrees to define such term to use of a negotiated rulemaking committee;.....
- (7) "negotiated rulemaking committee" or "committee" means an advisory committee established by an agency in accordance with this Subchapter and the Federal Advisory Committee Act to consider and discuss issues for the purpose of reaching a consensus in the development of a proposed rule";

Title 5 of the Code of Federal Regulations also defines consensus:

1 C.F.R. @ 385.82-4 (1986)(from Paragraph 11 of ACUS Recommendation 82-4, 47 Fed. Reg. 30,708, 30,710 (1982)), addressed consensus :⁵

"Consensus . . . means that each interest represented in the negotiating groups concurs in the result...."

"The Federal Advisory Committee Act, 5 U.S.C. app. 1 (1976 & Supp. V 1981), contains several provisions that inhibit an agency's use of consensual rulemaking. For example, it requires official chartering, open meetings, can be drawn upon in certain rulemaking contexts to provide procedures by which affected interests and the agency might participate directly in the development of the text of a proposed rule through negotiation and mediation. The Federal Advisory Committee Act (FACA) has, however, dampened administrative enthusiasm for attempts to build on experience with successful negotiations. Without proposing a general revision of FACA, the

⁵ "The objective of negotiated rulemaking is to reach "consensus" among the participants as to the content of the proposed rule. Harter characterized the definition of "consensus" as "one of the most difficult and complex questions in regulatory negotiation." He concluded that experience was necessary before anyone could develop more concrete ideas on what consensus should entail, pointing out, however, that the existence of a consensus is more a matter of feel than of mathematical calculation. The Harter formulation necessarily omitted detailed formulation of the conditions conducive to closure on an agreement." (13 to 11 does not have the "feel" of consensus).

Administrative Conference urged that Congress amend the Act to facilitate the use of the negotiating procedures contemplated in this recommendation.⁶

INDUSTRY CONSENSUS STANDARDS

The Industry Numbering Committee (INC)(under ATIS, CLC) states:


"Consensus is established when substantial agreement has been reached among interest groups participating in consideration of the subject at hand." (INC 95-0127-005, p. 10, Reissued April, 1997).

SUMMARY

The North American Numbering Council (NANC) has stated in its recommendation that it did not reach consensus (also the vote on NANP Administrator was 13 to 11), which is not consensus under applicable law, regulations, industry practice, or "feel", thus the NANC action cannot be recognized as a consensus by F.C.C. as a matter of law. NANC's activities in this matter are likely a participation in a negotiated rulemaking process, since the Commission has already indicated that the promulgation of a Regulation will occur.

Therefore, the F.C.C. must now review the NANPA submission(s) *de novo* and select an Administrator in a public manner or proceeding. Rulemaking emerging from the FCC's process should codify numbering administration, affirm that numbering is a public resource and not a private property right, and define and prohibit hoarding and warehousing and any other acts which facilitate anti-competitive activity to include enabled penalties.

Amended:
June 20, 1997



Richard C. Bartel
President,
& Individually

⁶ Georgetown Law Journal, August, 1986, 74 Geo. L.J. 1625, Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States, Henry H. Perritt, Jr.